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IN THE

Supreme Court of the United States

OCTOBER TERM, 1943.

No. 564

FIDELITY AND DEPOSIT COMPANY OF MARYLAND, A CORPORATION,

Petitioner,

against

PINKERTON'S NATIONAL DETECTIVE AGENCY, INC., A CORPORATION,

Respondent.

REPLY BRIEF OF PETITIONER.

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To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Respondent has filed a brief in opposition to the petition for writ of certiorari herein. We shall reply to the arguments made in the order in which they are presented in the brief and shall designate petitioner as "Surety" and respondent as "Pinkerton", as we did in our original brief.

I.

The Circuit Court of Appeals Did Decide a Genuine Issue of Material Fact.

(a) The proceedings of the Civil Service Commission of Illinois do not make O'Connell's duties a question of law. That commission has no power to and has never purported to prescribe O'Connell's duties. (Reply to Pinkerton's Point I(a)—Pinkerton's Brief, pp. 5-6.)

At pages 11 and 12 of its original brief the surety has related the substantial material evidence contained in the record, which proves that O'Connell did not receive Pinkerton's security by virtue of his office. Pinkerton's first contention is that this is a question of law determinable from a civil service examination notice given by the Illinois Civil Service Commission in 1938. This position is vulnerable in at least three respects.

First: the Illinois Civil Service Commission is not vested with authority to prescribe duties of civil service employees. Its power (as stated in Section 3 of the Act quoted on page 5 of Pinkerton's brief—Illinois Revised Statutes, 1941, Chap. 24½, Par. 3) is to "*classify* all the offices and places of employment in the State service, * * * with reference to the duties thereof, for the purpose of establishing grades and for the purpose of fixing and maintaining standards of examinations * * *". (Italics ours.) Section 3(a) of the Civil Service Act (Illinois Revised Statutes, 1941, Chap. 24½, Par. 4) provides:

> "The commission shall *ascertain* the duties of each office and place in the classified service and designate by rule the grade of each position." (Italics ours.)

It will be noted that the word used is "ascertain", not "prescribe", the duties of the various offices. Surely, if

the Commission were empowered to prescribe duties, it would be unnecessary to "ascertain" what it had itself prescribed, and if the legislature had intended to authorize the Civil Service Commission to "prescribe" duties, the word "prescribe" would have been used instead of "ascertain".

Further, if the Civil Service Commission had purported to prescribe the duties of Chief Security Examiner, the rule or order prescribing such duties, not a mere notice of examination, would be the evidence of such prescription. The fact is that the Civil Service Commission does not have power to prescribe duties of civil service employees and it has never purported to prescribe O'Connell's duties, and the notice set forth on page 5 of Pinkerton's brief does not purport to be a prescription of duties by the Civil Service Commission. At most, it is a statement of what the Civil Service Commission assumed were the duties of Chief Security Examiner in 1938, and, at most, when properly proven, the notice of examination may be some evidence to be weighed against Angsten's positive testimony that O'Connell was not authorized to receive collateral. It is not a basis for determining, as a matter of law, that O'Connell was authorized to receive deposits of collateral.

Second: The conversion of Pinkerton's security is alleged in the complaint to have occurred "during the year 1936" (Rec. 4). The issue in this case is whether O'Connell acted by virtue of his office in receiving Pinkerton's security prior to its alleged conversion in 1936 and even if the Civil Service Commission were empowered to prescribe duties and even if it had prescribed the duties of O'Connell in 1938, such prescription of duties is not relevant in determining O'Connell's duties in 1936.

Third: There is no evidence in the record of the proceedings of the Civil Service Commission related on page 5

of Pinkerton's brief and it will be noted that Pinkerton gives no page reference in its brief. Pinkerton has never relied upon the notice of the Civil Service Commission as constituting a legal designation of O'Connell's duties and has never contended that the Civil Service Commission was empowered to or did prescribe such duties until it made that contention at page 5 of its brief filed in this court. The information in reference to the proceedings of the Civil Service Commission in 1938 appears in the case, not from the record, but from a brief filed by the Attorney General of Illinois, as *amicus curiae*, in the Circuit Court of Appeals. The Attorney General did not contend that the Civil Service Commission had power to or had prescribed O'Connell's duties. He merely contended that the notice of examination, of which he asked the Circuit Court of Appeals to take judicial notice, was *evidence* which proved incorrect the surty's contention "that the Commission did not undertake to authorize generally the deposit of securities with O'Connell."

It is elementary that the facts in reference to the notice of the civil service examination cannot be brought into this case by judicial notice. In *National Bank of Wellington* v. *Chapman*, 173 U. S. 205, 217, this court held that it could not take judicial notice of a report of a state auditor of Ohio, and in *Robinson* v. *B. & O. Ry.*, 222 U. S. 506, 511, it held the same in reference to the decisions of the Interstate Commerce Commission. In *Gatch Wire Goods Co.* v. *W. A. Laidlaw Wire Co.*, 108 Fed. (2d) 433, 436 (C. C. A. 7) the court held that judicial notice could not be taken of the contents of a file wrapper in the Patent Office. In *Butler* v. *Illinois Traction, Inc.*, 253 Ill. App. 135, 148, the court held that judicial notice will not be taken of orders entered by the state Commerce Commission. In *People* v. *Dalton*, 61 N. Y. S. 263, the court held that judicial notice

will not be taken of the *rules and regulations of the Civil Service Commissioners* of the City of New York prescribed in accordance with the Civil Service Law.

Obviously, Pinkerton is compelled to take the position that O'Connell's duties are determinable as a matter of law because the substantial evidence that he did not act by virtue of his office entitles the surety to a jury trial unless the question may be resolved as a pure question of law. Pinkerton cannot take the position taken by the Attorney General—that the examination is *evidence* of delegation of authority by the Inrustrial Commission—because to take such position would merely emphasize that the question is one of fact and hence hinges upon conflicting evidence. To avoid the applicability of Rule 56 of the Federal Rules of Civil Procedure, Pinkerton must contend that O'Connell's duties were prescribed by law and the result is Pinkerton's feeble resort to the notice of civil service examination as constituting a legal prescription of O'Connell's duties.

Pinkerton's contention (Pinkerton's Brief, p. 9) that the surety, having speculated that the Circuit Court of Appeals would affirm the decision of the trial court that O'Connell did not act by virtue of his office, should not be permitted to have that issue determined by jury trial after adverse decision by the Circuit Court of Appeals, is merely tantamount to contending that a motion for summary judgment waives the right to trial. Rule 56 and each of the cases cited at pages 17 and 18 of the surety's original brief is authority that there must be a trial if there is a genuine issue as to material fact. If it is correct that the affidavit of Angsten does not establish incontrovertibly that O'Connell did not act by virtue of his office, to say the least, that affidavit is substantial evidence of such fact and the converse that it is incontrovertibly established

that O'Connell did act by virtue of his office does not follow.

(b) The receipt of Pinkerton's Treasury bond by O'Connell was not colore officii. (Reply to Pinkerton's Point 1(b)—Pinkerton's Brief, pp. 6-8.)

Pinkerton next argues that a precise delineation of O'Connell's duties is immaterial because in any event he accepted the deposit of Pinkerton's Treasury bond under color of his office. What is the fact that gives the color? Pinkerton says it is the fact "that O'Connell held the office of Chief Security Examiner of the Industrial Commission, the body charged with the administration of the Workmen's Compensation Law, and that in all things material he purported to be acting in that capacity and in the name of the Commission." (Pinkerton's Brief, p. 8.)

The quotation from Corpus Juris relied upon by Pinkerton (Pinkerton's Brief, p. 6—46 C. J. 1069) is specific authority that "something else must be shown beside the fact that in doing the act complained of the officer *claimed to be acting in an official capacity.*" (Italics ours.) The fact which furnishes the color necessary to make an act *colore officii* must be a specific power to do the act complained of under some circumstances.

Each of the cases cited by Pinkerton (Pinkerton's Brief, pp. 7-8) indicates that for an act to be *colore officii* there must be authority to do the act under some conditions, and if there is no power or authority to do the act in any circumstance the act is not *colore officii*, notwithstanding the fact that it is done by an office holder who purports to act officially. Thus, in *People, for use, etc.*, v. *Brown*, 194 Ill. App. 246, (Pinkerton's Brief, p. 7) the county clerk was authorized to issue county warrants for proper purposes.

He was not authorized to issue warrants to himself without consideration, but such issuance of warrants was held to be *colore officii*. The underlying fact which supplied the color was the fact that the clerk was authorized to issue warrants under some conditions. That case clearly indicates that in the absence of authority to do the act complained of under some conditions the doing of the act will not be *colore officii*. In that case the clerk not only issued the warrants, but negotiated them. He was not empowered to negotiate warrants under any circumstances, and his act of negotiation was held to be a private, as distinguished from an official, act, and to be not *colore officii*. (p. 250 of the opinion.) The court also recognized that the surety was not liable for damages flowing from the negotiation of the warrants, and the principal issue decided by the case is that the damages resulted from the issuance of the warrants, which was held to be an act done under color of the clerk's office.

The necessity of the existence of authority to do the act complained of under *some* circumstances in order to make the act *colore officii*, is well stated in *Taylor* v. *Albert Shields*, 183 Ky. 669, (210 S. W. 168, 3 A. L. R. 1619), where the question was whether the act of a police officer in arresting without a warrant was *colore officii*. The statute did not authorize the officer to make arrests in any circumstances in the absence of a warrant, and the court held that the arrest was not *colore officii*, quoting with approval, at page 674:

> "To constitute color of office such as will render an officer's sureties liable for his wrongful acts, something else must be shown besides the fact that in doing the act complained of the officer claimed to be acting in an official capacity. If he is armed with no writ, or if the writ under which he acts is utterly void, and if there is at the time no statute which authorizes

> the act to be done without process, then there is no such color of office as will enable him to impose a liabilitity upon the sureties in his official bond."

In the case at bar it cannot be said that O'Connell received Pinkerton's deposit of collateral *colore officii* in the absence of authority vested in O'Connell to receive deposits of collateral in some instances. Angsten says he had no such authority. (Rec. 43-44.) Whether O'Connell possessed such authority is a question of material fact upon which there is a genuine issue, and Pinkerton is only attempting to lift itself by its boot straps when it contends that O'Connell's act was *colore officii*, thereby rendering an exact delineation of his duties immaterial, because it is first necessary to ascertain his duties before it can be determined whether he acted *colore officii* in accepting Pinkerton's deposit.

(c) There is a genuine issue of fact as to the authority delegated to O'Connell by the Industrial Commission. (Reply to Pinkerton's Point 1(c)—Pinkerton's Brief, p. 8.)

Pinkerton confines its discussion of the evidence under it contention that there is such little conflict in the evidence as to warrant a court in directing a verdict to the statement: "a detailed discussion of the evidence to demonstrate the correctness of that contention would be inappropriate in this brief." (Pinkerton's Brief, p. 8.)

At pages 11-12 of our original brief, we related the substance of the affidavit of Peter J. Angsten, Chairman of the Illinois Industrial Commission during the time involved in this case. Since O'Connell's duties were not prescribed by law and are to be determined solely from delegations of power by the Industrial Commission, the

scope of his authority is to be determined primarily by considering such delegations of power by the Industrial Commission. Such consideration involves purely matters of fact. Angsten's affidavit is specific and definite that "The duty of said Lawrence J. O'Connell as chief examiner of securities of the said Commission during his employment as aforesaid was only to examine the financial statements of employers who applied to the Commission for self insurance, and that if such statements were not satisfactory to the Commission, to inform such employer thereof and also to inform him of the amount of securities such employer should deposit in the name of a qualified trustee in a qualified bank or trust company of the employer's own selection. Affiant further says that neither this affiant nor any other members of the Commission, to his knowledge, ever knew of the existence of the said supposed agreement between plaintiff and the Commission * * *. That said supposed agreement, if it was executed as alleged by plaintiff, was executed by the said Lawrence J. O'Connell without the authority, approval, direction or knowledge of the said Commission, or this affiant as Chairman thereof, and outside the duties of his said employment." (Record, pp. 43-44.)

Certainly this affidavit furnishes competent material evidence which is more than a scintilla that O'Connell was not authorized to accept the deposits of collateral and it cannot be passed off with the mere statement that a discussion in the brief is inappropriate.

Heart of America Lumber Co. v. *Belove*, 28 Fed. Supp. 619, 111 Fed. 2d, 535 (Pinkertons' Brief, p. 8) furnishes no justification for the Circuit Court of Appeals deciding the controverted issue of facts and no support for Pinkerton's argument. In that case a tenant sued a landlord for failure to rebuild a building destroyed by fire under the pro-

visions of the lease whereby the landlord agreed to repair within a reasonable time if the premises were rendered uninhabitable by fire. The affidavit of the defendant was to the effect that the walls of the building were destroyed and rendered useless by the fire. The affidavit of the plaintiff was that the walls remained standing. But the affidavits of both parties show that the roof and all floors had caved in. The court examined the applicable state law and ascertained that under a covenant to repair there was no duty on the landloard to rebuild and under the applicable state law the mere fact that the walls remained standing did not make it a repair job as distinguished from rebuilding. Thus the issue as to whether the walls remained standing was not material since, taking the facts on the plaintiff's affidavit, under the state law the work required amounted to rebuilding as distinguished from repairing. There is no statement in the decision that the court has a right to determine material issues of fact on summary judgment proceedings.

II.

The Industrial Commission Lacked Power to Act as Depository of Collateral From Self-Insurers, and for This Additional Reason O'Connel's Receipt of Pinkerton's Collateral Was Not by Virtue of His Office. (Reply to Pinkerton's Point II, Pinkerton's Brief, pp. 10-13.)

We have fully stated our position in reference to the authority of the Industrial Commission itself to act as a depository of collateral from self-insurers at pages 19-24 of our original brief. We recognize that there is no existing decision of a reviewing court of Illinois inconsistent with the decision of the Circuit Court of Appeals on this subject, and we also recognize that this court would not ordinarily grant the writ of certiorari to review this portion

of the Circuit Court of Appeals' decision. We do, however, hope that this court will grant the writ to review the other errors assigned, which come squarely within the examples specified by this court in its Rule 38 of circumstances when this court will exercise its discretion to review the action of Circuit Courts of Appeals by Writ of Certiorari; and we hope that if, prior to the time this court has made its decision, the Illinois Supreme Court does decide the question as to the power of the Industrial Commission itself to act as depository adversely to the decision of the Circuit Court of Appeals, this court will then also correct the action of the Circuit Court of Appeals in that respect.

But, while the action of the Circuit Court of Appeals on this one question would not ordinarily cause this court to grant the writ of certiorari, the mere fact that that question will not be reviewed does not determine the case. If the Industrial Commission lacked power, as we contend, to act as depository, of course the result would be that the surety is entitled to prevail without consideration of the other questions; but the fact that the Industrial Commission had power to act as depository does not entitle Pinkerton to prevail. In order for Pinkerton to prevail, it is also necessary that O'Connell acted by virtue of his office in accepting Pinkerton's deposit, and the fact that the Commission might have such power in no manner establishes that O'Connell was authorized to exercise that power of the Commission.

III.

Pinkerton's Action Is Barred by the Illinois Five Year Statute of Limitations. (Reply to Pinkerton's Point III, Pinkerton's Brief, p. 14.)

Pinkerton no longer takes issue with the surety's contention that the five year statute of limitations is applicable to its claim. Its sole justification for the refusal of the

Circuit Court of Appeals to apply the said statute is now its contention that the cause of action accrued on or after May 24, 1941, within the five year period when Pinkerton demanded the Commission to return the treasury bond.

Selleck v. *Selleck*, 107 Ill. 389 (Pinkerton's Brief, p. 14), is a case where possession of the Cook County bonds and subsequent proceeds of sale involved was obtained rightfully and under an agreement between the defendant and the plaintiff's privy to return on demand. Pinkerton persists in confusing the liability, if any, and relationship between Pinkerton and the Industrial Commission and the liability and relationship of O'Connell and Pinkerton. Even if the escrow agreement (Rec. 14, 15) is a binding contract between Pinkerton and the Industrial Commission, it is not and does not purport to be a contract between O'Connell and Pinkerton. If Pinkerton were suing the Industrial Commission for the failure to return its security, *Selleck* v. *Selleck*, 107 Ill. 389, would be applicable insofar as the statute of limitations is concerned if the escrow agreement is a valid contract of the Industrial Commission. In the case at bar, O'Connell did one wrongful act which created a liability against him. That act was the conversion of Pinkerton's bond specifically alleged to have occurred in 1936 (Rec. 4). Any cause of action which ever accrued to Pinkerton against O'Connell or his surety accrued by reason of that conversion. There is no contract between Pinkerton and O'Connell upon which to predicate the accrual of a second cause of action. *O'Connell* v. *Chicago Park District*, 376 Ill. 550 (cited in our original brief at page 28), is specific authority that where possession is wrongfully obtained the cause of action accrues at the time of obtaining of possession and that that is the only cause of action that arises out of the transaction. Even if the Industrial Commission had rightful possession of Pinkerton's security under the escrow agreement, O'Con-

nell never had the right to personal possession because the security, according to Pinkerton, was not deposited with O'Connell personally and there is no contract between Pinkerton and O'Connell personally. Consequently, the moment O'Connell took personal possession of the security in 1936 the cause, and the only cause which ever arose against him, accrued. Since Pinkerton no longer contests the applicability of the five year statute of limitations, it follows that the cause of action is barred by lapse of time under that statute.

Conclusion.

Pinkerton cannot make and has not made a convincing argument that there is not a genuine issue of material fact as to whether O'Connell acted by virtue of his office or that the cause is not barred by the Illinois five year statute of limitations. The defenses made are not technical. Pinkerton had no right to impose upon the surety responsibility for a loss sustained through dealings with O'Connell beyond the scope of his duties. The Circuit Court of Appeals decided material issues of fact in summary judgment proceedings in violation of Rule 56 of the Federal rules of Civil Procedure and in conflict with the decisions of the other Circuit Courts of Appeals, and the existing situation falls clearly within that type of cases which this court by its Rule 38 cites as examples when it may exercise its discretion to grant the writ of certiorari.

It is respectfully prayed that the said writ be granted and that this court review and correct the errors committed by the Circuit Court of Appeals.

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